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No. 889

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

HENRY HAROLD HOGUE, *Petitioner*,

v.

SOUTHERN RAILWAY COMPANY, *Respondent*.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Georgia

RESPONDENT'S MEMORANDUM CONFESSING ERROR

CHARLES A. HORSKY
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Attorney for Respondent

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This Court granted a writ of certiorari on January 28, 1968, to review a decision of the Georgia Court of Appeals, 116 Ga. App. 194, 156 S.E.2d 412 (1967), which held that a plaintiff under the Federal Employers' Liability Act who attacks a previously executed release on grounds of mutual mistake of fact must, as a condition to bringing his suit, tender back to his employer the consideration he received for the release.

In the petition for certiorari it was alleged that the decision of the Georgia court conflicted with other decisions under the F.E.L.A. In answering, respondent denied the alleged conflict, since the cases upon which petitioner relied involved attacks on a release based upon allegations of fraud, whereas his case rested upon an allegation of only mutual mistake of fact.

Respondent, while still of the opinion that the conflict alleged by petitioner does not exist, now believes, after further consultation with counsel, that its insistence before the Georgia courts that the applicable law required a tender, and the decision of the Georgia Court of Appeals requiring a tender were erroneous. Accordingly, respondent does not desire to offer brief or argument against petitioner on this issue, and confesses error. Respondent therefore invites the Court to examine the record and to vacate the decision below and remand the case for further proceedings. *Cates* v. *Haderlein,* 342 U.S. 804; *Metropolitan Bank* v. *Connecticut Mut. Life Ins. Co.,* 131 U.S. clxii. *Cf. Titmus* v. *Tinsley,* 370 U.S. 964.* Respondent will, of course, pay whatever costs may be assessed by the Court.

Respectfully submitted,

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* Georgia, like most other states, reverses decisions on appeal when the appellee confesses error. Turner v. Hardy, 198 Ga. 626, 32 S.E.2d 483, 491 (1944); 5B C.J.S. p. 348.